KUEH BAK HONG & ORS. v. POH THIAN SONG & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Tan Chiaw Tong J.) May 11, 1981]

[Kuching — Federal Court Civil Appeal No. 96 of 1980]

Practice and Procedure — Claim on partnership — Money ordered to be paid into court — Application for money to be deposited in bank to earn interest.

The appellants had sued the respondents for a declaration that a partnership be dissolved and for an accountant to be appointed to look into the affairs of partnership. The respondents were ordered to pay the sum of $100,000 into court pending the trial of the action. The respondents paid the money into court. The appellants applied that the money be deposited in a bank to gain interest. The learned Judicial Commissioner who heard the application refused it on the ground that the matter was *sub judice*. The appellants appealed.

Held: the learned Judicial Commissioner had exercised his discretion wrongly and the application should be granted.

FEDERAL COURT.

Chew Pok Oi for the appellants.

Benedict Lim for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We allowed this appeal against the refusal of the learned Judicial Commissioner to make an order for a sum of $100,000 paid by defendants into Court Deposit to be deposited in a licensed bank in Kuching as a fixed deposit with the view to earning interest for such period as the court may deem fit pending the trial of the action. We stated we would give our reasons. We do so now.

In April 1976 plaintiffs started a partnership business of timber logging contractor under the style of "Meng Kiang Enterprise" at No. 140, Foochow Road, No. 2, Kuching. The 2nd, 3rd, 4th and 5th defendants were the nominees of the 1st defendant. At all material time 1st defendant was the managing partner of the said partnership.

It was alleged that on February 28, 1979 the 1st defendant, without the knowledge or consent of the plaintiffs, ceased the business of the said partnership. From March 1, 1979 onwards 1st defendant by himself carried on the business of timber logging contractor. Plaintiffs asked 1st defendant to render a final account of the partnership. 1st defendant had not done so. Plaintiffs sued defendants and prayed for a declaration that the partnership between the parties known as "Meng Kiang Enterprise" be dissolved on February 28, 1979 and for the appointment of an accountant to look into the affairs of the said partnership up to the date of dissolution.

On September 15, 1979 the defendants were ordered to pay a sum of $100,000 into Court Deposit pending the trial of the action. On April 7, 1980 the defendants were ordered to comply with the above order within seven days. Defendants paid the sum of $100,000 into Court Deposit on the following day. The sum paid into Court Deposit is not earning any interest.

By a summons-in-chambers dated July 10, 1980 plaintiffs applied for an order that the sum of $100,000 paid into Court Deposit by defendants on April 8, 1980 be deposited in a licensed bank in Kuching in the name of the Sarawak Government as a fixed deposit to earn interest for such period as the court may deem fit. The interest so earned shall go to the party adjudicated entitled to the sum of $100,000. The application was supported by an affidavit sworn by Mr. Kueh Bak Hong.

On July 21, 1980 the summons came up for hearing in chambers before Mr. Y.C. Chiu who was then appointed Judicial Commissioner. Defendants raised no objection to the application. However, the learned Judicial Commissioner refused to grant the order on the ground that the matter was *subjudice*.

Clearly, the learned Judicial Commissioner misunderstood the true purpose of the application and therefore exercised his discretion wrongly. The application does not in any way affect the issue of the action. Before us the defendants again did not object to the application. There is no question of the matter being *subjudice*. It is in the interest of both parties that the money should earn interest instead of lying idle in Court Deposit as the suit may not come up for hearing for some time. There is no reason for the learned Judicial Commissioner to refuse the application. He ought to grant the order as prayed. Appeal allowed. Costs in the cause. Deposit to be refunded to appellant. Order in terms of the summons dated July 10, 1980.

Appeal allowed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Michael Ong & David Tiong.*

KOH KIAN HUAT TEA MERCHANT (PTE) LTD. v. LIAN SENG HANG TRADING COMPANY

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Tan Chiaw Tong J.) May 12, 1981]

[Kuching — Federal Court Civil Appeal No. 215 of 1980]

Practice and Procedure — Judgment against partnership firm — Application to issue execution against former partners of firm — Debt incurred before partnership shares transferred — Summons not served.

Partnership — Debt incured by partnership — Debt incurred before transfer of shares — Judgment against partnership firm — Application to issue execution against former partners of firm.

The appellant sued the respondent firm for balance of moneys due for price of tea. The appellants obtained judgment against the respondent for the sum of $21,462.09 with interest. It appeared the partnership originally consisted of seven partners but the other partners transferred their shares to one of them Chin Boon Wei. The writ of summons was served only on Chin Boon Wei and the other partners were not served individually. The appellant applied for leave to issue execution against the other six partners of the firm, alleging that part of the debt was incurred before the transfer of the partnership shares to Chin Boon Wei. Five of the other former partners were served with the summons and the learned judge gave liberty to levy execution against them. The summons against the sixth former partner could not be served and the appellant applied for leave to issue execution against him. The learned Judicial Commissioner who heard the application made an order refusing leave not only in respect of the sixth former partner but also in respect of the other five partners. The appellant appealed.

Held: (1) the learned Judicial Commissioner had no